

May 18, 2012

Marlene H. Dortch Secretary Federal Communications Commission 445 Twelfth Street, SW Washington, DC 20554

Re: Applications of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless for Consent to Assign Licenses; WT Docket No. 12-4 Notice of *Ex Parte* Meeting

Dear Ms. Dortch:

On May 16, 2012, Harold Feld, Legal Director, John Bergmayer, Senior Staff Attorney, and Jodie Griffin, Staff Attorney, of Public Knowledge ("PK") met with the following Federal Communications Commission staff to discuss the proposed license transfers and commercial agreements between Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless: Jim Bird, Neil Dellar, Virginia Metallo, and Joel Rabinovitz from the Office of the General Counsel, Sandra Danner, Rick Kaplan, Maria Kirby, Paul Murray, Tom Peters, Jim Schlichting, Joel Taubenblatt, Peter Trachtenberg, and Melissa Tye from the Wireless Telecommunications Bureau, Eric Ralph and Christopher Sova from the Wireline Competition Bureau, Jessica Campbell from the Media Bureau, and Marius Schwartz, Chief Economist, from the Office of Strategic Planning and Policy Analysis.

# The Commission Should Not Take Any Actions That Would Exacerbate the Growing Spectrum Gap.

PK discussed the growing spectrum gap between Verizon and AT&T and the rest of the industry, and how this gap threatens competition by depriving competitors of the resources they need to grow their networks, improve their service, and acquire new customers. The spectrum gap takes on additional urgency in the context of an overall "spectrum crunch," because there is no alternative source of spectrum to potentially reduce the gap. Here, where other commenters have demonstrated that Verizon has adequate spectrum to meet its needs for the next few years, the overall benefit of transfering the spectrum to Verizon is reduced, the competitive concerns of increasing the existing spectrum gap should weigh more heavily against approving the transaction.

PK noted that its has a Petition for Reconsideration since the last time the FCC altered the cap in the Verizon-Alltel transaction, <sup>1</sup> and urged the FCC to resolve the Petition before resolving the pending transaction. Even if the FCC does not modify the screen, the screen is explicitly a guideline and not a rule. It does not create a "safe harbor," and the Commission is free to depart

<sup>&</sup>lt;sup>1</sup> See Petition for Reconsideration of the Public Interest Spectrum Coalition, WT Docket 08-94 (filed Dec. 8, 2008), available at http://apps.fcc.gov/ecfs/document/view?id=6520190308.

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from it when necessary. Indeed, a *refusal* to depart from the sectrum screen where necessary would violate the Administrative Procedure Act, since the screen has been repeatedly modified without notice and comment on the understanding that it is a policy statement, not a rule. Even if in a particular market the existing screen is not triggered, the Commission should still deny a license transfer that, like this one, would adversely affect competition.

PK described how the screen should be modified to take into account various relevant factors, such as the utility of a given band of spectrum for wireless broadband purposes and the concentration of spectrum holdings. The presentation mirrored in substance PK's *ex parte* of March 27, 2012.<sup>2</sup>

PK also argued that any "commitment" by Verizon to divest itself of certain licenses falls well short of a binding requirement that it sell those licenses.<sup>3</sup> For example, a "commitment" leaves open the door for Verizon to claim that no buyer met its price. And without Commission oversight it is likely that AT&T would simply acquire the licenses, which would do nothing to improve overall wireless competitiveness. While the Commission, of course, would have to approve any transfer of licenses to AT&T, it would be better if it required Verizon to divest those licenses to smaller competitive carriers from the beginning. Such a condition would encourage greater participation by competitive carriers (since they could hope to win Lower 700 MHz B block licenses), conserve resources, and speed deployment by avoiding unnecessary review.

Regardless, even if a carrier besides AT&T acquired Verizon licenses this would not be enough to balance out the anti-competitive impact of the overall transaction. The 700 MHz licenses Verizon has proposed to be rid of would not give a competitive carrier a nationwide footprint or do much to lessen the power of the nascent duopoly of Verizon and AT&T. At the very least AWS licenses would have to be part of any mandatory divestitures. PK noted that Verizon is in a better position than smaller carriers with regard to negotiating roaming agreements with other carriers, which means that its customers would experience no degradation of service were any particular licenses to go to one of its smaller competitors.

In addition, PK argued that the transfer of the AWS licenses to Verizon on a condition that Verizon auction its Lower 700 MHz A&B bands could adversely affect the ability of small carriers that currently hold Lower A licenses, or which would acquire Lower A licenses to deploy handsets and other equipment. AT&T would be the only carrier of scale to hold Lower 700 MHz B licenses, and, as the FCC has recognized, AT&T has not supported interoperability efforts for the Lower 700 MHz band. To the extent the FCC views Verizon's sale of the 700 MHz licenses as promoting competition and thus mitigating spectrum concentration concerns,

<sup>2</sup> *See* Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Mar. 27, 2012), *available at* http://apps.fcc.gov/ecfs/comment/view?id=6017026875.

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<sup>&</sup>lt;sup>3</sup> See Phil Goldstein, *T-Mobile's Humm: Verizon's 700 Mhz Spectrum Sale Isn't Enough*, FIERCEWIRELESS (Apr. 23, 2012), http://www.fiercewireless.com/story/t-mobiles-humm-verizons-700-mhz-spectrum-sale-isnt-enough/2012-04-23.



the Commission should resolve its work on promoting interoperability before moving forward with this transaction.<sup>4</sup>

# The Joint Operating Entity Is Directly Relevant to the Commission's Review of the Proposed License Transfers and Threatens Substantial Competitive Harm.

When the Commission evaluates whether a proposed license transfer under Section 310(d) serves the public interest,<sup>5</sup> the Commission must in the first instance determine who the proposed licensee is. Any agreement that gives rise to an attributable interest is thus directly relevant to the Commission's review. This concern is independent of other concerns arising from Sections 613, 628, 629, and 652.<sup>6</sup>

The JOE Agreement gives rise to an attributable interest under Title III and Sections 613 and 652. [BEGIN HIGHLY CONFIDENTIAL]

### **END**

HIGHLY CONFIDENTIAL] PK also noted that Verizon Communications, as the single majority shareholder in Verizon Wireless, is considered to exercise complete control over Verizon Wireless. Under the Commission's attribution rules, direct control will always create an attributable interest. Accordingly, any attribution to Verizon Wireless is wholly applicable to Verizon Communications, and attribution for Verizon Communications flows through Verizon Wireless to Comcast, Time Warner Cable ("TWC"), Bright House Networks, and Cox.<sup>8</sup>

The Applicants have not complied with even the relatively modest insulation criteria under the attribution rules. The Applicants have not attempted to certify that the parties will not

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<sup>&</sup>lt;sup>4</sup> See generally Promoting Interoperability in the 700 MHz Commercial Spectrum, WT Docket No. 12-69, Interoperability of Mobile User Equipment Across Paired Commercial Spectrum Blocks in the 700 MHz Band, RM-11592, Notice of Proposed Rulemaking (2012).

<sup>&</sup>lt;sup>5</sup> 47 U.S.C. § 310(d).

<sup>&</sup>lt;sup>6</sup> See 47 U.S.C. §§ 533, 572, 628, 629; Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4, at 5–6, 36–45, Conf. App. A-1–A-2, A-8–A-9 (Feb. 21, 2012) ("Petition to Deny").

<sup>&</sup>lt;sup>7</sup> [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

<sup>&</sup>lt;sup>8</sup> In addition, the JOE creates attribution among the cable operators regardless of whether Verizon Communications is considered attributable. While this may not trigger concerns under Section 652, it may raise concerns under other sections of the Act, such as Section 613 or Section 628.

<sup>&</sup>lt;sup>9</sup> See 47 C.F.R. § 76.501 Notes 1–5.



discuss programming or other media-related activities, <sup>10</sup> and in any event the JOE itself makes any such certification impossible. **[BEGIN HIGHLY CONFIDENTIAL]** 

## [END HIGHLY CONFIDENTIAL]

The Applicants themselves have argued, as justification of classifying all information pertaining to the JOE as "Highly Confidential," that this information is so sensitive that employees or consultants of competitors in decisionmaking capacities cannot be trusted to view it. Yet [BEGIN HIGHLY CONFIDENTIAL]

## [END HIGHLY CONFIDENTIAL] Either

the information pertaining to the JOE does not deserve "Highly Confidential" classification, or exposure to this information creates an attributable interest and undermines the claim that the members of the JOE will compete vigorously against one another in video and broadband.

The Applicants' document production in this proceeding only confirms that the JOE will be a space for its members to collude on video programming product and service offerings going forward—thus creating an attributable interest—and in other lines of business where they have pledged to remain competitors. [BEGIN HIGHLY CONFIDENTIAL]

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<sup>&</sup>lt;sup>10</sup> See 47 C.F.R. § 76.501 Note 2(f)(1).



## **[END HIGHLY**

## **CONFIDENTIAL**]

The Transaction Impacts Wireless Competition By Removing Existing Wi-Fi-Based Competition Between TWC and Verizon Wireless, and Creating Barriers To Potential Wi-Fi Based Competition From Others.

The transaction, particularly the Joint Marketing Agreements (JMAs) and the JOE, also threatens the potential removal of wifi-based operators from the marketplace. For example, TWC recently filed a patent application for technology that will allow a user to initiate a session on a mobile device on either a cellular network or through a wifi hotspot and then "roam" to another network (either cellular or wifi) without initiating a new session. Many have concluded that this technology will enhance the existing wifi-based competition in the New York Metro area between cable operators TWC and Cablevision to Verizon's quadplay offering. Absent TWC's participation in the JOE, TWC could be expected to use this technology to compete against Verizon Wireless and would readily license this technology to other potential wireless providers that did not compete directly with TWC within its footprint, and to other wireless providers such as Sprint or T-Mobile that do not offer competing video or competing wireline broadband products.

However, TWC's participation in the proposed transactions at issue in this proceeding removes its motivation and ability to use patents like the one described above to compete vigorously in the marketplace—or to license to other Verizon competitors. The proposed transactions embody an implicit decision that TWC will no longer compete with Comcast and Bright House Networks with their overall market strategies. Furthermore, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] TWC would even be required to [BEGIN HIGHLY CONFIDENTIAL]

<sup>20</sup> [BEGIN HIGHLY CONFIDENTIAL] CONFIDENTIAL]

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<sup>21</sup> [BEGIN HIGHLY CONFIDENTIAL]

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<sup>&</sup>lt;sup>16</sup> [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

<sup>&</sup>lt;sup>17</sup> [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

<sup>&</sup>lt;sup>18</sup> See Steve Donohue, *Time Warner Cable Files WiFi Roaming Patent Application*, FIERCECABLE (Apr. 13, 2012), http://www.fiercecable.com/story/time-warner-cable-files-wifiroaming-patent-application/2012-04-13.

<sup>&</sup>lt;sup>19</sup> See, e.g., id.



### [END HIGHLY CONFIDENTIAL] This not only

makes it less likely that the technology will be licensed to competitors like Cablevision or T-Mobile, but discourages such potential competitors from developing competing technology for fear of expensive litgation over potential patent infringemnt.

## [BEGIN HIGHLY CONFIDENTIAL]

## **[END HIGHLY**

## **CONFIDENTIAL**]

PK noted that these harms flowing from anticompetitive collective licensing strategies could be avoided or reduced by requiring the JOE to make its technology available for license on reasonable and non-discriminatory terms, which could be imposed under the Commission's authority under Sections 310 and 629.

# The Applicants' Over-Claiming of Confidentiality Protections Harms Public Discourse in this Proceeding.

Finally, PK noted that the Applicants have claimed highly confidential treatment for information in the JOE Agreement that is neither confidential nor highly confidential.<sup>24</sup> PK has

<sup>&</sup>lt;sup>22</sup> [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

<sup>&</sup>lt;sup>23</sup> Steve Donahue, *How Will Time Warner Cable and Verizon Wireless Innovate?*, FIERCE CABLE (Apr. 26, 2012), http://www.fiercecable.com/story/how-will-time-warner-cable-and-verizon-wireless-innovate/2012-04-26?utm\_medium=nl&utm\_source=internal#ixzz1tAee1rf3.

<sup>&</sup>lt;sup>24</sup> PK noted that the distinction between confidential and highly confidential protection is not insignificant, because the scope of people who are permitted to access highly confidential information is much more restricted. See Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses, Second Protective Order, WT Docket No. 12-4, DA 12-51, ¶ 7 (Jan. 17, 2012) ("Second Protective Order"). When employees of a company are not able to access information because it



moved for the Commission to require Applicants to make available [BEGIN HIGHLY CONFIDENTIAL] to

allow public to access and review the governance structure of the JOE in this proceeding.

The Applicants have no proprietary interest in structure of the JOE's board and governance structure, so hiding this information from the public provides no competitive value to the Applicants. In contrast, submitting this information into the public record creates immense value by raising the level of public debate on this issue. Applicants contend that the JOE Agreement is a pro-competitive research agreement, but the details of the Agreement reveal that the JOE poses serious threats to innovation and competition in wireline and wireless services.

The information that should be made public here does not fall within the exemptions from the disclosure mandate of the Freedom of Information Act ("FOIA").<sup>25</sup> Importantly, FOIA exemptions do not themselves prohibit an agency from making information public, but agencies are limited in what information they can reveal under the Trade Secrets Act, absent other authorization by law or regulation.<sup>26</sup>

The information here is neither a trade secret, nor does it qualify as confidential commercial information. Disclosure of basic information regarding how the JOE is structured and controlled would not cause substantial competitive harm, and as such is not protected by the Trade Secrets Act. This information would not disclose, for example, product plans or competitive operations of the JOE, but would allow the public to fully appreciate the anticompetive incentives that the JOE will create in each of its members.

PK also urged the Commission to stop permitting Verizon to submit documents into the record under highly confidential protection and only verify whether the documentS in fact qualify as highly confidential at a later date. PK understands that this process was permitted in an effort to expedite document production for those with access to highly confidential information. However, if the Applicants are unable to make the requisite production within the Commission's deadlines, the Commission should pause the shotclock to allow the Applicants more time to review the appropriate designation of their documents before the Applicants submit the documents into the record.

is protected as highly confidential, the company may be less likely to realize the competitive harms it may incur as a result of the transactions, and thus less likely to object to the transactions.

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<sup>&</sup>lt;sup>25</sup> See 5 U.S.C. § 522. See also Challenge to Confidentiality Designation of Public Knowledge, WT Docket No. 12-4 (May 9, 2012).

<sup>&</sup>lt;sup>26</sup> See 18 U.S.C. § 1905.

# **Public** Knowledge

A redacted version of this letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules and the Protective Orders in this proceeding. Should you have any questions, please contact the undersigned.

Sincerely,

/s/

Harold Feld Legal Director

John Bergmayer Senior Staff Attorney

Jodie Griffin Staff Attorney Public Knowledge jodie@publicknowledge.org